

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals, Zahra, P.J., Neff and Cooper, JJ.

46TH CIRCUIT TRIAL COURT,
Plaintiff-Counter-Defendant-
Third Party Plaintiff-Appellee,

Supreme Court Docket No. 128878
Court of Appeals Docket No. 254179
46th Circuit Court (Crawford) No. 02-005951-CZ

v

CRAWFORD COUNTY and CRAWFORD
COUNTY BOARD OF COMMISSIONERS,
Defendants-Counter-Plaintiffs-
Third Party Plaintiffs-Appellants,

and
KALKASKA COUNTY,
Intervening Defendant-Counter-Plaintiff-
Third Party Plaintiff-Appellant,

v

OTSEGO COUNTY,
Third-Party Defendant

REPLY BRIEF ON APPEAL—APPELLANTS

ORAL ARGUMENT REQUESTED

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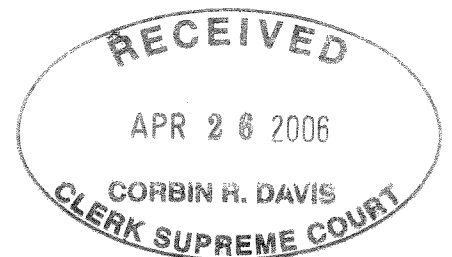


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STATEMENT OF QUESTIONS PRESENTED

(As framed in the December 28, 2005 order granting leave to appeal, 474 Mich Adv 986)

Issue I: “What evidence supports the conclusion that the level of funding offered by the counties was insufficient to allow the court to fulfill essential court functions?”

Crawford and Kalkaska Counties, appellants, answer “none”.

Issue II: “With respect to the dispute over pension and health care benefits, what evidence supports the conclusion that these benefits were reasonable and necessary to achieve the court’s constitutional and statutory responsibilities, and that the court’s failure to obtain such benefits so affected employee morale, or the court’s ability to retain or hire competent employees, that they were reasonable and necessary to achieve the court’s constitutional and statutory responsibilities?”

Crawford and Kalkaska Counties, appellants, answer “none”.

Issue III: “Whether Crawford County entered into a [valid or enforceable] contract with the 46th Circuit Court to fund pension and health care benefits at a specific level?”

Crawford and Kalkaska Counties, appellants, answer “no”.

REPLY TO APPELLEE'S CRITIQUE OF APPELLANTS' METHODOLOGY

The 46th CTC posits that Judge Kolenda made adverse findings about the credibility of the various county commissioners "in his role as trier of fact." However, the Crawford contract issues were decided at the summary disposition stage, before Judge Kolenda heard a single witness. It is always error to make findings of fact on a motion for summary disposition in the face of conflicting evidence. *Hubscher & Son v Storey*, 238 Mich App 478, 482 (1998); *Reed v Kaydon Engineering Corp*, 38 Mich App 353, 356-357 (1972).

REPLY TO APPELLEE'S INTRODUCTION

The 46th CTC ignores its sole culpability in fomenting this litigation as well as the underlying dispute over grandiose pension and retiree health care benefits. The 46th CTC alone decided to ignore Crawford's request for information (2098-2099a) justifying over-budget spending, and to expend no effort to identify fiscally prudent cost-saving measures (1458-1461a; 1502-3a; 1553a, 2015-2018a). For its part, Otsego sought to foist the lion's share of its own unfunded SEP-related liability for enhanced pensions onto Crawford and Kalkaska.

Court consolidation led to no significant problems in the 46th CTC's ability to stay abreast of its caseload (1453a, 1474a)—which also flatly contradicts the claim it was "fighting for its very existence * * * in 2003. Consolidation was designed to save money and avoid Headlee problems, Const 1963, art 9, §29; retroactively enhancing pension benefits is facially unconstitutional for judges, clerks, and other agents of the 46th CTC. Const 1963, art 11, §3¹.

Any "morale" problem is self-created by the 46th CTC—any representations Judge Davis made to court employees were never authorized by Crawford or Kalkaska. Judge Davis' recognition of this fact is revealed *inter alia* in Implementation Order 2000-11 (722-723a).

¹ "Neither the legislature nor any political subdivision of this state shall grant or authorize extra compensation to any public officer, agent or contractor after the service has been rendered or the contract entered into."

Defying the dictates of the order granting leave, the 46th CTC claims no evidence as to “morale” is necessary because common sense dictates “morale will plummet” if enhanced benefits are not continued forever. But Issue 2 as framed by this Court asks, *using exclusively the past tense*, what “evidence supports the conclusion * * * that the court’s failure to obtain such benefits so affected employee morale, or the court’s ability to retain or hire competent employees, that they were reasonable and necessary to achieve the court’s constitutional and statutory responsibilities.” Both sides were forbidden to argue any other issues.

Meanwhile, as shown below, the 46th CTC’s entire argument flows from three “Big Lies”: (1) Crawford and Kalkaska cut the 46th CTC’s appropriations; (2) Crawford and Kalkaska retained concessions but reneged on their *quid pro quo* obligations; and (3) Admin Order 1998-5 contemplates perpetual contracts outside the collective bargaining context.

REPLY TO THE 46TH CTC’S “STATEMENT OF FACTS AND PROCEEDINGS”

The 46th CTC purports to offer a counterstatement of facts in blatant contravention of the requirements of MCR 7.306(A) and MCR 7.212(D)(3)(b) that it provide “specific page references to the [Appendix²]”—with two exceptions where it refers to opinions of Judge Kolenda—and point out specific “deficiencies or inaccuracies” in the counties’ Statement of Facts. 46th CTC violates MCR 7.212(D)(1) and (3)(b), which require that any contrary version of the facts appear at the outset of its brief in its Statement of Facts, with each such fact to be supported by citation to the record (appendix). The 46th CTC’s defective counterstatement must therefore be ignored. *Falk v State Bar of Michigan*, 418 Mich 270, 307 n. 5 (1983).

REPLY TO ARGUMENT

Issue I: “What evidence supports the conclusion that the level of funding offered by the counties was insufficient to allow the court to fulfill essential court functions?”

² MCR 7.212(D)(3)(b) actually refers to “the transcript, the pleadings,” etc., which for present purposes means “the appendix”. MCR 7.306(A).

Reply to Counterstatement of the Standard of Review

The 46th CTC contends this Court should defer to Judge Kolenda's credibility determinations, without further inquiry into their legitimacy, as well as his findings of "historical fact". But historical fact is not really at issue here—the appropriations made to the 46th CTC for any relevant year are documentary, as are the relevant county resolutions, Crawford's refusal to approve or sign the contract drafted by the 46th CTC, and the identical statements by Kalkaska and Otsego that, unless all 3 signed, none would be bound. It is only (a) ultimate constitutional facts, (b) the lack of statutory authority for perpetual contracts, and (c) the failure to enter into any agreement fulfilling the requirements of *Studier v MPSEB*, 472 Mich 642, 660 ff (2005) for a valid contract with a legislative body as to pensions or other employee benefits, that are disputed, and the 46th CTC agrees that all such "facts" are subject to de novo review. Citing libel cases of no relevance, the 46th CTC ignores *Fiske v Kansas*, 274 US 380, 385-386; 47 S Ct 655, 656-657; 71 L Ed 1108 (1927), and misrepresents the application of de novo review in *Employees & Judges et al v Hillsdale County*, 423 Mich 705, 724-725 (1985).

Contrary to MCR 7.212(D)(2), the 46th CTC neither cites authority nor proffers a different standard than "serviceability" as the proper test of funding. (124a). Having failed to cross-appeal as to that issue, appellees are bound by the Court of Appeals' ruling.

A. Reply to "Pertinent Historical Background"

As the first of three "Big Lies", appellees claim that, at the outset of FY 2003, Crawford "implemented a draconian 19.4% reduction in the shared cost budget proposed by the Trial Court." The truth is the 46th CTC habitually submitted unrealistic and inflated budgets. In 2003, the 46th CTC's budget request to Crawford (\$1,203,974) was a staggering 27.9% higher than its inflated 2002 request (\$941,486, adjusted for pro ration). Comparing budget requests to appropriations is thus deliberately misleading—and not responsive to Issue 1. The 46th CTC

concedes it met its constitutional and statutory responsibilities *based on actual funding* through 2002 (1453a, 1474a). Thus, appropriations, not budgets, must be compared.

Crawford's actual appropriations were 2.75% higher in 2002 over 2001, and 16.26% higher than in 2003 over 2002³ (2092a). Merely because the 46th CTC ignored actual funding and spent like a drunken sailor through the first 9 months of FY 2003⁴, it was not constitutionally underfunded. The 46th CTC was obligated to spend within appropriations, *Judges of the 74th Judicial District v Bay County*, 385 Mich 710, 726 (1971), particularly where its own experience demonstrates (and its own expert's cost savings prove, 2009-13a; 2022-31a) it could have done so and still fulfilled *all* its statutory and constitutional responsibilities, *as it did in 2002 and 2001 when available funds were less*—even aside from possibly eliminating *non-mandated* operational expenses like research attorneys (1464a) and district court probation (1416a-1417a)⁵.

Note that the 46th CTC NEVER sued Kalkaska for even 1¢ of supposed underfunding.

B. Reply to 46th CTC's Claim as to Minimum Necessary Funding

The 46th CTC totally ignores the directive to identify evidence “that the level of funding

³ In 2002, Crawford's pro rata share of the overall judicial budget was 24%; in 2003, it was 27%. The 2003 appropriation, adjusted for pro ration differential, was over 3.5% higher than 2002, and compares with a decrease of 1.1% in Crawford's County General Fund appropriations (2093-4a).

⁴ As of July 1, 2003, the 46th CTC's own expert, Ross Childs (in conjunction with Rudi Edel), and Fred Todd jointly identified \$256,832 in savings that could be generated in the remaining ¼ of the fiscal year (2009-2013a); 2022-2031a, aside from pension issues. Of course, the 46th CTC rejected its own expert's position and insisted that it could continue its wastrel ways.

⁵ The 46th CTC compounds its Big Lie #1 with arithmetic misdirection, claiming Crawford's 2003 appropriation was really a decrease because two half-time probate judges (one each in Crawford and Kalkaska) were to assume full-time status in April, 2003. That argument glosses over the fact another half-time equivalent judge was transferred to Roscommon County (1091b)—for a net increase of one-half of one judge's salary for two counties, reduced further by eliminating any need for visiting judges (\$6000, 1097b line 20) and for FOC referee expenses for work now done by judges (\$16175—1097b, line 50). Crawford's adjusted operating expense appropriations increase for 2003 (accounting for inter-county proration differentials) of \$29,262 would thus translate into \$108,377 when combined with equivalent net 3.34% increases by Kalkaska and Otsego.

offered by the counties was insufficient to allow the court to fulfill essential court functions.” Nor has it pointed to evidence contradicting the testimony of its own Co-Administrator and Chief Judge that it consistently functioned with no backlog of cases, no speedy trial problems, and no failure to fulfill a single identifiable constitutional or statutory mandate (1453a, 1474a)⁶.

The 46th CTC tilts at windmills, claiming it was efficient, employee salaries reasonable, etc. None of this equates to evidence “that the level of funding offered by the counties was insufficient to allow the court to fulfill essential court functions.” Again, the 46th CTC’s own expert found potential savings of \$1 million+ in its 2003 expenses (2009-13a; 2022-31a).

Issue II: “With respect to the dispute over pension and health care benefits, what evidence supports the conclusion that these benefits were reasonable and necessary to achieve the court’s constitutional and statutory responsibilities, and that the court’s failure to obtain such benefits so affected employee morale, or the court’s ability to retain or hire competent employees, that they were reasonable and necessary to achieve the court’s constitutional and statutory responsibilities?”

The entire premise of the 46th CTC’s reasonable and necessary claim (“Big Lie #2”) is that Crawford adversely affected employee morale by accepting phased out longevity and restructured healthcare, but then reneged on the purported obligation to provide enhanced pension and retiree healthcare. Crawford consistently declined to accept any benefit changes, and equally insisted the 46th CTC was duty-bound to implement fiscally prudent cost savings without receiving new benefits in exchange (2095-2096a, 2097a, 2098a, 2099a).

⁶ Meanwhile, the 46th CTC acknowledges (46th CTC brief, pp. 14-15) it pursues no claim as to any fiscal year prior to 2003 (thus abandoning Count III of its complaint (146a)). Notably, Count IV of the Complaint identifies the cause of any funding “emergency” as Otsego’s declination to make any appropriation for 2003 (149a, ¶44), ostensibly along with Crawford’s refusal to appropriate funds so the 46th CTC could retain outside counsel to sue Crawford (*id.*, ¶43). The 46th CTC also falsely claimed (*id.*, ¶44) it would be without funds as of January 1, 2003—although neither Crawford’s nor Kalkaska’s appropriations would have been (or were) exhausted by then, and it was Otsego that should have been sued (if anyone).

Discreditably, the 46th CTC threatened that if Crawford did not sign the “contract” to provide enhanced pension and retiree healthcare benefits, the purported longevity and health care reduction savings would not occur, (1993a, 1270a, 1694-1695a). But then, over Crawford’s objections, the 46th CTC unilaterally implemented all the disputed benefits (721-723a). Thus, any “morale” problems were solely caused by Judge Davis. The 46th CTC fails to identify any evidence responsive to this Court’s formulation of Issue 2, merely speculating on future morale problems arising from Judge Davis’ precipitous and unilateral promises to his employees. The undeniable fact: despite B-2 pensions in Crawford, most of Kalkaska, and a large part of Otsego, a greatly inferior SEP plan in the remainder of Otsego, and a B-3 plan for two Kalkaska employees, not one 46th CTC employee quit, threatened to quit, or even complained about benefits prior to this lawsuit being filed (1225a, 1468-1469a, 1492a, 1535a). Nor did one single 46th CTC staff position go unfilled by a qualified and competent applicant (1475a). The counties are not constitutionally required to fund a health care or pension plan more expensive than what is reasonable and “serviceable”. *Studier, supra*; Admin Order 1998-5.

The 46th CTC falsely claims it cannot “unwind” its MERS B-4 plan. To the contrary, Appellants are entitled to any relief necessary to implement their refusal to approve enhanced benefits, irrespective of any lower court orders in the interim. *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc*, 465 Mich 303, 307 (2001); MCL 600.1475. And, of course, per *Studier* there is no binding contract—that holding would be rendered nugatory if unilateral action by the 46th CTC could preclude appellate review and relief⁷.

⁷ Contrary to the 46th CTC’s misrepresentations, MERS can return or credit any assets it received from the counties or the 46th CTC. “Rollovers” to any qualified plan or to an IRA are not taxable events if accomplished within 60 days of the date MERS disgorges the assets. See *e.g.* 26 USC §408(d)(3); *Construction Industry Retirement Fund of Rockford, Ill v Kasper Trucking, Inc*, 10

Issue III: “Whether Crawford County entered into a [valid or enforceable] contract with the 46th Circuit Court to fund pension and health care benefits at a specific level?”

A. Reply to “Facts Relevant to the Contract Issue”

The 46th CTC first refers to a “Tri-County Committee”, an informal group with no legal status or power⁸. Next, the 46th CTC claims all three counties resolved in mid-2000 that, for 3 years, they would confer “for the purpose of arriving at a yearly budget for court operations” and that Otsego as control unit “shall bill each of the other two Counties monthly for their allocated share of expenses” (19-21b). Nowhere did this require agreement on a judicial operating budget, or require funding above appropriations in violation of MCL 141.439, or defease the powers of successor county boards to manage county affairs per Studier, supra.

The 46th CTC’s employees have never had a legally recognized collective bargaining representative. . Judge Davis’ hearsay testimony (826-827b) that, during a social occasion, he broached his ideas to some employees who lacked a collective bargaining representative, MCL 423.26, fails to establish a contract with his employees—but in no event could it establish a contract with the counties. *Employees and Judges et al v Hillsdale County, supra*, 423 Mich at 719-720; see also *Judicial Attorneys Ass’n v State*, 459 Mich 291, 300-301 (1998).

F3d 465, 469 (CA 7, 1993). Any reimbursement or credit by MERS would not be taxable, since such funds never legitimately belonged to any 46th CTC employee.

Nor do employees who have retired—well knowing of this litigation—have any vested rights to continuation of B-4 pensions—they must make restitution (the usual method, as when QDRO’s are amended, being to reduce future benefits for a period equal to that during which excess benefits were paid by the amount of the overage). MCL 600.1475.

⁸ Kalkaska flatly refused to authorize creation of a “local court management council” per Admin Order 1998-5, Part IV, or to cede any of its powers to such a body. The Tri-County Committee was thus purely advisory. The 46th CTC’s attempt to claim a contract based on the notion mere silence of this advisory body (1480-1481a) was equivalent to approval by all three counties, is thus entirely without legal validity. Each county could only discuss and approve such benefits and make necessary implementing appropriations at open meetings, MCL 15.263(1)-(3); MCL 46.1(2). Absent statutory authority no decision or act done by any number of commissioners other than while assembled as a board is a valid act. *Zachary v Milin*, 294 Mich 622, 624 (1940).

B. Reply to 46th CTC's Claim of Enforceable Contracts

In their futile attempt to distinguish *Studier, supra* as involving a state statute, appellees ignore *Atlas v Wayne Co Bd of Auditors*, 281 Mich 596, 599 (1937), which totally contradicts their position. Likewise, appellees attempt to distinguish *City of Hazel Park v Potter*, 169 Mich App 714, 719-720 (1988) as inapposite to contracts involving “business affairs”—glaringly overlooking the salient fact that *Studier* itself involved retiree health care and pension benefits and applied the identical legal principles, 461 Mich at 662-663.

To avoid this result, appellees turn to “Big Lie #3”, claiming Admin Order 1998-5 supports their contract claim. But Admin Order 1998-5 Part II contemplates only multi-year *collective bargaining contracts*⁹, normally three years¹⁰ duration or less. Moreover, only the Legislature can delegate powers to counties¹¹, but AO 1998-5, by its terms (Part I), governs only trial courts, not counties. Third, no contract was ever formed.

⁹ The 46th CTC was not unionized in 2000-2003, so its employees had no certified bargaining representative. MCL 423.26. Even if there had been a collective bargaining agreement between the 46th CTC and its employees, that contract was not valid unless actually funded by the counties. *Hillsdale, supra*, 423 Mich at 719-720; *Bay County, supra*.

¹⁰ MERC has adopted the 3-year contract bar rule from the NLRB. *Wyoming Police Dept*, 1985 MERC Lab Op 84, 89-90; *General Cable Corp*, 139 NLRB 1123 (1962).

¹¹ Counties require statutory or constitutional authority to make contracts. Const 1963, art 7, §1; *Wright v Bartz*, 339 Mich 55, 60 (1954); *Alan v Wayne Co*, 388 Mich 210, 245 (1972). Appellees’ incorrectly rely on MCL 45.3, which authorizes all “necessary” contracts “in relation to the property and concerns of the county.” Trial courts having functioned since 1837 without funding contracts, necessity is lacking, while, per Studier, compelling reasons to preclude hog-tying future Legislatures abound. *Sittler v Bd of Control of Eastern Mich College of Min & Tech*, 333 Mich 681, 686-687 (1952). Nor do appellees explain why there are specific statutes (see Appellants’ Brief, pp. 37-38)—none of which applies here—for each allowable intergovernmental contract. Considered in light of the cardinal principle that the Legislature is presumed not to enact useless legislation, *Klopfenstein v Rohlfing*, 356 Mich 197, 202 (1959), fundamental logic requires application of the principle *expressio unius est exclusio alterius*, *Stowers v Wolodzko*, 386 Mich 119, 133 (1971).

Moreover, judicial operations are not “property” or “concerns” “of counties” at all. Statutes separate from those relating to county business authorize funding units to appropriate funds for trial court operations. MCL 600.591(1); MCL 600.837(1); MCL 600.8271(1).

To avoid *Studier, Atlas and Potter*, appellees cite *Harbor Land Co v Gross Ile*, 22 Mich App 192 (1970), which held that a municipality may contract concerning its “business or proprietary powers”, limited to “water supply, street lighting, gas supply, flood prevention, sewerage, and the like”. *Id.* at 205. Funding of court operations is not within that rubric.

Meanwhile, *Harbor Land Co* cited with approval Anno: Power of board to make appointment to office or contract extending beyond its term, 149 ALR 336, which cites *King County v United States M & Shippers Ins Co*, 150 Wash 626; 274 P 704 (1929), as holding that a contract to procure insurance for the county could be validly abrogated by a new county board—just as Crawford (Feb., 2002) and Kalkaska (Dec., 2001) validly rescinded any approval of retiree health insurance and pensions their predecessor Boards might be found to have made in 2000 (1840a, 1850a). One legislature may not bind its successors as to funding, but may only appropriate the funds it has on hand. *Harris v City of Lansing*, 342 Mich 701, 707-708 (1955). To the extent appellees quote the Court of Appeals’ opinion below, their selected passage can only be described as an anticipatory critique of *Studier*, which has superseded such sentiments. *Boyd v W G Wade Shows, Inc*, 443 Mich 515, 523 (1993). Any party dealing with public officials must at its peril take notice of the limitations on the officials’ authority to bind the municipality. *Utica Savings Bank v Village of Oak Park*, 279 Mich 568, 578-579 (1937).

C. Reply to “Specifics of Retiree Benefits the Counties Ostensibly Agreed to Fund”

The 46th CTC fails to identify any evidence supporting a contract for retroactive enhanced pensions, so that *is* an issue on which the counties must prevail. And the proposed “retiree health care fund”—illegal under MCL 38.1213—was never approved in the form demanded by the 46th CTC, whose proposed written agreement giving the Chief Judge *carte blanche* to do whatever he (now she) desires (1685a, ¶¶3 and 4) was rejected by Crawford..

As both purported contracts are in perpetuity or nearly so, a written contract is required by MCL 566.132(a), and by general principles of municipal law—a contract must be approved during an open meeting, MCL 15.263(1)-(3), and reflected in the minutes, MCL 46.4; *Stevenson v Bay City*, 26 Mich 44, 45 (1872), then be signed by the chairperson, MCL 46.3(5). These statutes preclude oral contracts with municipalities. *G L Mezzetta, Inc v City of American Canyon*, 78 Cal App 4th 1087, 1093; 93 Cal Rptr 2d 292, 296 (2000)¹².

Finally, even the 46th CTC's tortured reading of Crawford's August 29, 2000 resolution as to enhanced pensions in no way creates a contract. *Studier, Atlas, Potter, supra*.

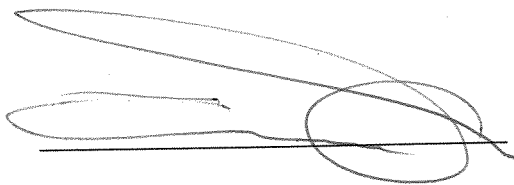
D. No "Implied in Law" Contract Can Possibly Exist

Studier rejects as destructive of the continued existence of government any doctrine that would recognize implied contracts with legislative bodies, short of "clear and unequivocal expression". 472 Mich at 661-662. In response to "Big Lie #2", the counties did not accept any supposed "concessions"—the 46th CTC unilaterally foisted its plan onto the counties (as recognized in Implementation Order 2000-11 (1703-1704a, ¶¶3-4). In any event, the counties have acknowledged any such "consideration" may be reclaimed, which represents the fullest extent of any possible obligation. *Whipple v Parker*, 29 Mich 369, 374 (1874).

RELIEF REQUESTED

The judgments of the lower courts should be reversed, and the cause remanded with instructions to dismiss all claims by the 46th CTC with prejudice and to implement MCL 600.1475. Reversal of all cases held in abeyance per MCR 7.302(G)(1) should then follow.

Respectfully submitted,

A handwritten signature in dark ink, consisting of a large, stylized 'S' followed by a horizontal line and a circular flourish.

¹² Appellees fail to explain how the burden of proving need for a written contract ever shifted away from the 46th CTC as plaintiff. *Kar v Hogan*, 399 Mich. 529, 539 (1976).

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Dated: April 26, 2006